IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05-01-2005

CORAM

THE HONOURABLE MR. JUSTICE A.KULASEKARAN

W.P. No. 37702, 37707 and 37708 of 2004
and
W.P.M.P. No. 45256, 45259 and 45260 of 2004
-o-

W.P.No.37702 of 2004:

The State of Tamil Nadu
rep. by the Deputy Commissioner(CT)
Coimbatore Division
Coimbatore .. Petitioner

Versus

1. Tvl.Shree Murugan Flour Mills
(P) Ltd.,
Pollachi

2. The Secretary
The Tamil Nadu Sales Tax Appellate
Tribunal (Additional Bench)
Coimbatore .. Respondents

W.P.No.37707 of 2004:

The State of Tamil Nadu
rep.by the Deputy Commissioner(CT)
Chennai (North) Division
Chennai .. Petitioner

Versus

1. Tvl. Metro Castings (P) Ltd.
127, Linghi Chetty Street
Chennai-600 001

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2. The Secretary
   The Tamil Nadu Sales Tax Appellate
    Tribunal (Additional Bench),
   Chennai. ..Respondents

W.P.No.37708 of 2004:

The State of Tamil Nadu
rep.by the Deputy Commissioner(CT)
Coimbatore Division
Coimbatore .. Petitioner

Versus

1. Tvl. The Saravana Balaji Steels
   43, Ansari Street
   Coimbatore

2. The Secretary
   The Tamil Nadu Sales Tax Appellate
    Tribunal (Additional Bench)
   Coimbatore .. Respondents

Petitions filed under Article 226 of The Constitution of India praying for a Writ of Certiorari as stated therein.

For petitioner : Mr.Manoharan S.Sundaram,
Government Advocate (Tax) in
all WPs for Special Govt. Pleader (Tax)

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COMMON ORDER

These writ petitions are posted today for admission and I heard the learned Government Advocate (Tax) appearing for the petitioner in all the writ petitions.

2. The petitioner has come forward with W.P.No.37702 of 2004 praying for a writ of certiorari to call for the records on the file of the second respondent pertaining to the order dated 12.11.2001 made in CTSA No.277 of 2000 and quash the same as illegal.

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3. W.P.No.37707 of 2004 has been filed praying for a writ of certiorari to call for the records on the file of

the second respondent pertaining to the order dated 10-12-2003 made in STA No.353 of 2001 and quash the same as illegal.

4. W.P. No. 37708 of 2004 has been filed praying for a Writ of Certiorari to call for the records on the file of the second respondent pertaining to the order dated 06-01-2003 made in CTA No.115 of 1997 and quash the same as illegal.

5. The issues involved in all the three writ petitions are almost similar, hence, they are disposed of by this common order.

6. The first respondent in W.P.No.37702 of 2004 are dealers in wheat flour and Atta flour. The first respondent was assessed on the total and taxable turnover of Rs.2,44,90,328/- and Rs.65,57,439/- respectively as against the reported total and taxable turnover of Rs.2,49,57,187.40 and Rs. Nil respectively for the year 1993.1994 under the Central Sales Tax Act. The Assessing Officer in his proceedings dated 27-10-1997 disallowed the claim of exemption on Rs.65,47,439/- as consignment sales and brought to tax as outright inter-state sales assessable to tax at 8% and also levied penalty of Rs.9,83,616/- under Section 9(2) (A) of CST Act, 1956 read with Section 12 (3) (b) of TNGST Act, 1959. Aggrieved by the order of assessment, the first respondent herein preferred an appeal in AP CST No.33 of 1998 to the Appellate Assistant Commissioner (CT), Pollachi, who by an order dated 03-03-2000 allowed the appeal in respect of disallowance of consignment sales. A second appeal was filed by the State against the order of Appellate Assistant Commissioner before the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Coimbatore in C.T.S.A. No. 277 of 2000 and the Tribunal by order dated 12-11-2001 confirmed the order of the Appellate Assistant Commissioner and dismissed the appeal filed by the State.

7. The first respondent in W.P.No.37707 of 2004 are manufacturers of MS ingots. By order dated 15-04-1998, the Commercial Tax Officer, Harbour-II Assessment Circle, Chennai disallowed the claim of exemption on Rs.27,45,583/- as consignment sales and treated them as direct inter-state sales assessed at 8% and also levied penalty of Rs.3,06,598/-. Aggrieved by the order of assessment, the first respondent preferred an appeal in AP CST No. 94 of 1998 before the Appellate Assistant Commissioner (CT),

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Chennai, who, by order dated 18-08-2000 confirmed the levy of penalty on a turnover of Rs.27,45,583/- but deleted the entire penalty. As against the said order, a second appeal was preferred by the State before the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Chennai and the appellate authority, by order dated 10-12-2003 dismissed the appeal preferred by the State.

8. The first respondent in W.P. No. 37708 of 2004 are dealers in MS rods and bars. The Assessing Officer, in his proceedings dated 13-06-1996 disallowed the claim of exemption on Rs.2,07,345/- as consignment sales and brought to tax as outright inter-state sales assessable to tax at 8% and also levied a penalty of Rs.24,882/- under Section 9 (2) (A) of the Central Sales Tax Act, 1956 read with Section 12 (3) (b) of the TNGST Act. Aggrieved by the said order of assessment, the first respondent preferred an appeal in AP CST No. 202 of 1996 before the Appellate Assistant Commissioner (CT), Coimbatore, who, by order dated 31-01-1997 dismissed the appeal in respect of disallowance of consignment sales. Aggrieved by the same, the first respondent filed second appeal before the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Coimbatore, in CST No. 115 of 1997 and the appellate authority, by order dated 06-01-2003 allowed the appeal.

9. In all these writ petitions, the appellant herein has stated that as against the order of Sales Tax Appellate Tribunal, a tax revision to this Court under Section 38 of the TNGST Act was originally available. In virtue of the Tamil Nadu Amendment Act 42 of 1992, the words 'High Court' found under Section 38 of TNGST Act was substituted by the words 'Special Tribunal' and all matters arising under TNGST Act is now dealt with by Tamil Nadu Taxation Special Tribunal constituted for the purpose under the Tamil Nadu Special Tribunal Act, 1999 and the Special Tribunal is vested with the jurisdiction to deal with the matters arising under the Act as enumerated in the Schedule to the said Act. In respect of matters arising under Central Sales Tax Act, division bench of this Court in its order in TC Nos. 129 and 130 of 1996 dated 08-04-1999 held that on and from 22-12-1995, the power to hear tax revision and appeal was no longer available and dismissed the tax revision. Another division bench of this Court held that the Tamil Nadu Taxation Special Tribunal has no jurisdiction to hear the matters arising under the Central Sales Tax Act, hence, the petitioner is left with no other alternative remedy except to approach this Court under Article 226 of the

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Constitution of India. In view of the same that the Special Tribunal is not functioning, the matters relating to Central Sales Tax Act can be heard by this Court, hence the writ petitions are entertained by this Court.

10. Mr. Manoharan Sundaram, learned Government Advocate (Tax) appearing for the petitioners addressed common arguments in all the writ petitions stating that the order of the Tribunal is contrary to law; that the Assessing Officer has rightly acted in treating the turnover as direct inter-state sale under the guise of consignment sales; that the Tribunal ought to have verified whether the agents have sent the exact proforma value in respect of the goods or whether the dealers camouflaged the sales as consignment sales; that the assessee has not proved that the entire tax was paid in other states by the agents; that the Tribunal failed to note that the dealers received the value mentioned in form XX delivery note from their agents; that the Tribunal failed to note that when there are materials to show that the goods were despatched by a dealer against payment that the transactions are inter-state sales; that the Tribunal failed to appreciate that the goods received by the agents were sold on the same day in the same quantity which would prove that the goods ought to have been moved only in pursuance of pre-existing contract of sale; that the agent became purchaser when he pays the price to the principal on his own responsibility; that when there was no contract of sale between the dealer and ultimate purchaser was not an insurmountable obstacle in the process of finding out the nature of character of the said transaction, if there are other relevant facts and circumstances, besides, the conduct of the parties from which a legitimate inference can be reasonably drawn as to existing contract of sale between the dealer and ultimate buyers in various states, pursuance to the movement of goods commenced from one state to another. The production of Form F is not the end of all the situations and it is always open to the assessing authority to call for further particulars in order to satisfy himself that the entries made in Form F are true and correct and prayed for setting aside the orders of the Tribunal.

11. It is necessary to have a cursory look into the relevant provisions of Central Sales Tax Act namely Sections 3, 6, 6-A, 8 and 9 before taking into consideration of the character of the sales.

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12. Section 3 provides for the criterion as to when a sale or purchase of goods can be said to take place in the course of inter-state trade or commerce. Section 6 lays down the liability of tax. Section 6-A has been inserted for the purpose of providing that the burden of proving any movement of goods from one state to another was occasioned otherwise than as a result of sale would be on the dealer making such claim. Section 8 deals with rate of tax on goods sold in the course of inter-state sale. Section 9 provides for the levy and collection of tax and penalty.

13. The question for consideration is whether the goods, which are transported to other state to their agent can be taken into consideration for inter-state trade.

14. It is open to the dealer to prove whether a sale or purchase of goods has taken place in the course of inter-state trade or commerce by any other evidence, but once the dealer chooses to file a declaration in Form F, the burden would be upon him to show that the particulars mentioned in Form F are true. If he fails to establish that the particulars mentioned in Form F are true, it would be open to the assessing authority to record a finding that there is no material to show that the transfer of goods is otherwise than by way of sale.

In a Division bench of this Court in (A. Dhandapani Vs. State of Tamil Nadu and another) 1995 Sales Tax Cases Volume 96 Page NO.98 it was held in para – 8 thus:-

> "8. ...Under Section 6A(1) of the Central Sales Tax Act, 1956, the burden is on the dealer to prove that the movement of the goods was occasioned not by reason of sale, but was occasioned by reason of transfer, of such goods by him to any other place of his business or to his agent or principal outside the State. The burden so cast on the dealer may be discharged by furnishing the declaration as prescribed (F Forms) along with the evidence of despatch of such goods. Furnishing of the declaration (F forms) is not compulsive or mandatory. It is open to the dealer to discharge the burden cast on him, in any other manner, by adducing other

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evidence. In cases where the dealer exercises the option of furnishing the declaration (F forms), the only further requirement is that the assessing authority should be satisfied, after making such enquiry, as he may deem necessary, that the particulars contained in the declaration furnished by the dealer are 'true'.

Therefore, the assessing authority is obliged to peruse the declaration in form F and make such enquiry as he deems necessary to find out whether the particulars found in the declaration are true. In this regard we may point out that he is not guided mainly or solely in deciding the issue on the fact as to whether the requirements of sub-rule (3A) of rule 4 of the CST (TN) Rules has been complied with. As we have already pointed out, these provisions are directory and not mandatory. Further, the question as to whether there has been an actual sale of the goods or there has been a transfer of goods to the agent otherwise than by way of sale is also a matter which can be established by other evidence. But once the dealer chooses to file a declaration in form F, the burden would be upon him to show that the particulars mentioned in form F are true. If he fails to establish that the particulars mentioned in form F are true. it would be open to the assessing authority to record a finding that there is no material to show that the transfer of goods is otherwise than by way of sale. The conclusion of the authority to the effect that the dealer has failed to establish that the transfer of goods is otherwise than by way of sale and such a finding would be a finding for the purposes of the Act and such transfer shall have to be deemed to be a sale of goods in the course of inter-state trade or commerce for the purposes of the CST Act. On

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the contrary, if the authority accepts that the particulars contained in the declaration filed in form F are true, the dealer is discharged and the effect of such an order would be that the movement of goods to which the declaration relates shall be deemed for the purposes of the CST Act to have been occasioned otherwise than as a result of sale..."

15. under sub-section (1) of Section 6-A of Central Sales Tax Act and form F prescribed in sub-rule (5) and the first proviso thereto of Rule 12, it is contemplate that there is no need or necessity at all for the agency to be always evidenced by a document in writing. The said view is taken in the decision reported in (State of Tamil Nadu Vs. Cocoa Products and Beverages Limited) 1998 Volume 109 Sales Tax Cases Page No.634, wherein it was held in para -21 thus:-

"21. No doubt, as we have earlier indicated, they got themselves registered as 'registered dealers' under the CSTA at Bombay, only with effect from January 30, 1984. While interpreting the salient provisions adumbrated under sub-section (1) of section 6-A of the CSTA and form 'F' prescribed under sub-Rule (5) and the first proviso thereto of rule 12 of the Rules, it is seen that there is no need or necessity at all under the CSTA for the agency to be always evidenced by a document in writing; but it may also be oral and such an agency is deducible from the very nature of the transaction that took place between two different individuals at different ends in the process of effecting despatch of goods from one end to the other end, for open market sale, that is to say, from one State to a different State on consignment basis and the person effecting despatch of the goods being considered as principal and the person to whom goods were despatched being considered as agent of the said

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principal. It is further said that a liberal interpretation has to be given to the first proviso to sub-rule (5) of rule 12 and form 'F' prescribed under the said Rule. We also quoted the interpretation as given by learned authors K. Chaturvedi and M.K. Chaturvedi in their book on Central Sales Tax Laws, as stated above. We affix our seal of approval to the interpretation so given by the said learned authors.

16. Payment of price in advance made by the agent not necessarily transform the agent as a purchaser. The fact to be decided without reference to the factum of pre-payment and the price as held in the decision reported in (The State of Tamil Nadu v. State Trading Corporation of India Ltd.,) 1986 Sales Tax Cases Volume 61 Page No.341, wherein in para-7, it is held thus:-

"7. `As has been pointed out by the Supreme Court in (1968) 21 STC 312 (SC) (Sri Tirumala Venkateswara Timber and Bamboo Firm V. Commercial Tax Officer, Rajahmundry), that, in law, there is a clear distinction between the contract of sale and contract of agency by which the agent is authorised to sell or buy on behalf of the principal and make over either the sale proceeds or the goods to the principal. The essence of a contract of sale is the transfer of title to the goods for a price paid or promised to be paid. The essence of agency to sell is the delivery of the goods to a person who is to sell them not as his own property but as the property of the principal, who continues to be the owner of the goods and will, therefore, be liable to account for the sale proceeds. In that case, the Supreme Court has pointed out that the true relationship of the parties in each case has to be gathered from the nature of the contract, its terms and conditions and the terminology used by the parties is not

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decisive of the legal relationship. As already pointed out, the agreement entered into between the parties clearly shows that the Civil Supplies Corporation in Andhra Pradesh and Kerala are constituted only as agents and they cannot be taken to be buyers of the goods for a price. The terms of the agreement make it clear that the goods are delivered by the State Trading Corporation to the Civil Supplies Corporations only in their capacity as distribution agents and there is no sale as between them. In this view of the matter, we do not think that any interference is called for in the orders of the Tribunal."

17. A sale can be said to be in the course of inter-state trade only if two conditions are fulfilled namely (i) a sale of goods and (2) transport of those goods from one state to another. Unless both these conditions were satisfied, there could be no sale in the course of inter-state trade. There must be evidence that the transportation was occasioned by the contract and as a result goods moved out of the bargain between the parties from one state to another, as held in the decision reported in (Commissioner of Sales Tax, U.P., Lucknow vs. Suresh Chand Jain) 1988 Sales Tax Cases Volume 70 Page No.45 @ Page 47, wherein it was held thus:-

"The principles of inter-state sales were well settled. In Bengal Immunity Co., Vs State of Bihar (1955) 6 STC 446 (SC) Justice Venkatarama Ayyar had held that sale could be said to be in the course of inter-state transport of those goods from one State to another. Unless both these conditions were satisfied, there could be no sale in the course of inter-state trade. There must be an evidence that the transportation was occasioned by the contract and as a result goods moved out of the bargain between the parties from one State to another."

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18. It is seen from the assessment orders that the assessing officers disallowed the consignments on the ground that the first respondent received the value mentioned in Form XX delivery note from their agents. Form XX delivery note is used only for transacting the goods which are not sold but to be entrusted. The price mentioned in the delivery note is always an approximate price and not the actual price. Admittedly, the revenue in all the three cases has not produced before the Tribunal or this Court any evidence that the value mentioned in the delivery note is the actual price of the goods alone. In the absence of such evidence, it is to be followed that the trade practice as well as the principles adopted in pricing the goods consigned to agents, by the principle as per the standard accountancy books and has stated that the proforma invoice is intended only to communicate the approximate price and not the accounts or actual price.

19. It is an admitted fact that the assessing officers have not rejected Form F as required in law. Without rejecting Form F, it is not open to the assessing officers to call for other evidence as has been held in (State of Tamil Nadu Vs. Cocoa Products and Beverages Limited) 1998 Volume 109 Sales Tax Cases Page No.634 cited supra.

20. Central Sales Tax Act is a special Act and the mode of proof prescribed under the Act alone is sufficient for the purpose of Section 6A of the CST Act, 1956.

21. Rule 4(3-A) of CST Rules will be attracted only when Form F is not produced. The Tribunal has rightly appreciated the arguments advanced by the assessee that once the specific proof prescribed under Section 6A of CST Act by way of Form F with sales pattials and proof of despatch of goods, form XX and that discharged the burden of proof, the claim under under Section 6A can be disallowed only after rejecting Form F, that too for the reasons to be recorded in writing.

22. Under Section 9 (2-A) of CST Act read with Section 12 (3)(b) of the TNGST Act, penalty is leviable. Penalty could be levied only in case where the assessment is a best judgment assessment made on an estimate and not by relying solely on the accounts furnished by the assessee in the prescribed return. Section 12 (3), explanation requires the turnover relating to the tax assessed on the basis of the accounts of the assessee, to be disregarded

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while determining the turnover on which penalty is to be levied under Section 12 (3). The bonafides of the person, who is alleged to have withheld the tax is also a factor which the assessing authority must consider even in cases where the tax is found to have been withheld. Followed (Appollo Saline Pharmaceuticals P Ltd Vs. Commercial Tax Officer (FAC) and others) 2002 Sales Tax Cases Volume 125 Page No.505 wherein in Para Nos. 7 and 8 it was held thus:-

> "7. Though other sub-sections of Section 12 were amended by the State Legislature subsequent to the date of the judgment in the case of Jayaraj Nadar & Sons (1971) 28 STC 700 (SC) Sections 12 (1) and 12 (2) have remained in the same form. The legislative intention therefore, except during the period December 3, 1979 to May 27, 1933 and on and after April 1, 1996 must be taken to be to, permit the levy of penalty only in case where the assessment is a best judgment assessment made on an estimate and not by relying solely on the accounts furnished by the assessee in the prescribed return. On and after April 1, 1996 an explanation has been added below section 12 (3) which requires the turnover relating to the tax assessed on the basis of the accounts of the assessee, to be disregarded, while determining the turnover on which the penalty is to be levied under Section 12 (3).
>
> 8. The assessments for the assessment years 1993-94 and 1994-95 which were assessments made on the basis of the accounts, and not based on any other material and were not estimates, have therefore, to be regarded as assessments made under Section1 2 (1) to which the penal provisions of Section 12 (3) are not attracted. The levy of penalty for these two assessment years is set aside."

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23. In this case, the assessee, namely, the first respondent in the above writ petitions have discharged their burden by filing the documents required. Indeed, they have filed Form F prescribed under Section 6-A of the CST Act and furnished prescribed particulars thereon, the assessing authority has not given any finding that the declarations produced by the assessees are defective or not genuine and Form F also not rejected. The assessees have also proved that the principals received lesser value, equal value and more value as sale proceeds than that of the value mentioned in the delivery note. The goods were sold by the agents in the pattials and the expenses have debited by the agents, hence the transaction cannot be treated as direct inter-state sales in the absence of any material evidence. Moreover, the writ petitions are filed belatedly against the order of the Tribunal, which were passed in the year 2000 and 2003 respectively without assigning any valid explanation. Hence, the orders passed by the Tribunal is confirmed.

24. In the result, the writ petitions are dismissed. No costs. Consequently, connected WPMPs are closed.

rsh

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1. The Secretary
   The Tamil Nadu Sales Tax Appellate
   Tribunal (Additional Bench)
   Coimbatore

2. The Secretary
   The Tamil Nadu Sales Tax Appellate
   Tribunal (Additional Bench)
   Chennai

+ Three Copies to Spl. Govt. Pleader (Taxes),
SR Nos. 769 to 771

Pre-delivery Order in
WP.No. 37702, 37707
& 37708 of 2004.
5-01-2005

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